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No. 89-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

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Implicitly acknowledging that the judgment of the Court of Appeals cannot be sustained on the court's own terms, the Union Respondents have abandoned the court's reasoning and now advance a new set of arguments. To present their case, however, the Union Respondents have to ignore the plain language of the exemption statute, 49 U.S.C. § 11341(a), disregard the holding of *Schwabacher v. United States*, 334 U.S. 182 (1948), and impute to Congress an intent that is contradicted by express legislative actions over the decades. Moreover, even on its own terms, the Union Respondents' approach fails, point by point.

ARGUMENT

I. This Case Is Controlled By The Plain Language Of The Exemption Statute And By This Court's Decision In *Schwabacher v. United States*.

The Court of Appeals held that railroads carrying out ICC-approved consolidations are not exempt from claims based on labor agreements because (1) the exemption "from all other law" applies only to positive statutory enactments; (2) private contracts are not such enactments; and (3) labor agreements are private contracts. That holding obviously conflicts with *Schwabacher*, in which the Court gave effect to the plain language of the exemption statute, holding that the exemption "from all other law" applies to claims based on private contracts.

The Union Respondents do not defend the Court of Appeals' reasoning. Instead, they contend that claims based on labor agreements are outside the exemption not because they are *contractual* in nature, but because they pertain to *labor* relations. Thus, all the Union Respondents say about *Schwabacher* is that it does not apply here because it did not involve labor relations. Union Br. at 43 n.57.

For the Union Respondents to prevail here, the Court would have to hold that the statutory phrase "all other law" must be read to mean "all other law except the law pertaining to labor agreements." We have already shown, in our opening brief, why this reading is foreclosed. In Part II, below, we show why the specific contentions presented by the Union Respondents in support of their proposed rephrasing of the exemption statute should be rejected on their own merits. Preliminarily, we should explain why

much of what the Union Respondents have said in their brief is simply beside the point in connection with this Court's consideration of the question on certiorari.

First, this case is *not* about the ICC's continuing handling of the disputes between the railroads and the Union Respondents following remand by the Court of Appeals. Although the Union Respondents devote an extensive portion of their brief (pp. 10-15) to the ICC remand proceedings, nothing that has happened in those proceedings is pertinent to the question of the reach of the § 11341(a) exemption. The ICC has made clear that its June 20, 1990 Remand Decision, *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715 (1990),[1] was confined by the Court of Appeals' narrow reading of the exemption, which the ICC regards as establishing the law of the case pending this Court's decision here. *Id.* at 722, 745, 750, 756 n.34. Of course, the decision here will guide the further proceedings on remand, for it will matter, in the application of the ICC's authority to administer employee protective conditions under 49 U.S.C. § 11347, whether the railroads are already exempt from the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and labor agreements to the extent necessary to permit them to carry out the approved consolidation; for this reason, the ICC has made clear that it will have to reconsider the Remand Decision if this Court agrees

[1] The ICC has denied the railroads' petitions to reopen and reconsider or clarify the Remand Decision. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22), decision served October 29, 1990.

with petitioners and the Federal Respondents as to the extent of the § 11341(a) exemption. But the reverse is not true; the ICC's interpretation of its § 11347 powers, undertaken in the shadow of the Court of Appeals' ruling, does not assist in resolving the problem of statutory construction now presented to this Court.[2]

Moreover, this case is *not* about the use of arbitration in supposed tension with the commands of the RLA, as the Union Respondents suggest (Br. at 33-34, 42, 44). Of course, the original ICC decision in this case (89-1027 Pet. App. at 29a) was rendered on review of an arbitration award (Joint App. at JA-8) which resolved a dispute between ATDA and these petitioners under the ICC's protective conditions. The ICC concluded, *inter alia*, that its arbitrator had framed his award on the basis of a correct understanding of the scope of the § 11341(a) exemption. But the exemption does not depend on arbitration, or any other specific form of dispute resolution, for its existence; it is self-executing and does not imply issuance of an ICC order of any kind beyond the

[2] The ICC set forth its position in its decision denying the railroads' petitions for a stay of the Remand Decision. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22), decision served July 20, 1990. See Appendix to Petitioner's Supplemental Response To Motion To Dismiss, filed by petitioner CSX Transportation, Inc. in Case No. 89-1028 on September 28, 1990 ("Pet. Supp. Resp. App. (89-1028)") at 10a. The ICC also made clear that it would have to reconsider any suggestion in the Remand Decision that the reach of § 11341(a) is merely coextensive with the ICC's authority under § 11347, see 6 I.C.C.2d at 754, if this Court were to reverse the Court of Appeals' decision. Pet. Supp. Resp. App. (89-1028) at 10a n.9.

original consolidation approval decision, *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287, 298 (1987) (Stevens, J., concurring) (citing *Schwabacher*). Limitations on the use of compulsory arbitration under the RLA are plainly irrelevant to the decision whether that statute is, in the first instance, encompassed within "all other law" from which railroads carrying out an approved consolidation are exempt.

Questions involving the particular ways in which the protective conditions are applied, including questions regarding interpretation of the language of the conditions themselves as adopted by the ICC in accordance with its § 11347 mandate, are for another day. However, the orderly administration of the protective conditions, including judicial review of ICC decisions in the lower courts, will be assisted immeasurably by a determination now that the § 11341(a) exemption does extend to claims that are based on a railroad's contracts and are asserted exclusively under federal law.

II. Congress Has Not Limited The ICC's Authority Over Railroad Consolidations In Any Way That Changes The Operation Of The Exemption Statute.

Distilled, the Union Respondents' argument is that because Congress has not given the ICC general responsibility "to authorize new rates of pay, rules, or working conditions" (Union Br. at 40), § 11341(a) is ineffective to bar enforcement of RLA labor agreements that would prevent a railroad from carrying out a transaction the ICC had approved as in the public interest. In advancing this proposition, the Union Respondents simply cast ordinary principles of statutory construction adrift. The Union Respondents

make no attempt to explain why it matters whether or not the ICC has "complete control" over railroad labor relations (Union Br. at 43 n.57), and it clearly does not matter. By its terms, § 11341(a) vests the ICC with "exclusive" jurisdiction over consolidations and mergers and exempts railroads from "all other law" as necessary to permit them to carry out an approved transaction.[3] There has been no congressional action withdrawing railroad labor relations from the operation of § 11341(a).[4]

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[3] This Court has long recognized that the exemption provision relieves carriers from the antitrust laws even though the ICC does not have "either the duty or the authority to execute" or "to enforce" those laws. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944). The ICC is, of course, to take account of the policies underlying the antitrust laws when deciding where the public interest lies, *id.* at 85-87, but the ICC is "not to measure proposals for all-rail consolidations . . . by the standards of the anti-trust laws," *id.* at 85. Congress has similarly directed that the ICC consider "the interests of carrier employees affected by the proposed transaction," 49 U.S.C. § 11344(b)(1)(D), when passing on a proposed consolidation and, beyond that, has, in § 11347, mandated employee protective conditions to compensate employees who are adversely affected by the consolidation. Nothing in this suggests that § 11341(a) is ineffective in the face of the RLA (and labor agreements) because the ICC does not have the authority to execute and enforce that law.

[4] The Union Respondents assert (Union Br. at 24, 43) that § 11341(a) is an implied repeal statute, hoping by this to obtain the benefit of the doctrine that repeals by implication will be found to have occurred only when it is impossible to give effect to the competing statutes. But that doctrine has nothing to do with this case. Section 11341(a) does not implicitly repeal the RLA or any other statute; it creates an *express* exemption from "all other law," intended to permit railroads to carry out an approved transaction. *See generally Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966) (contrasting

The Union Respondents, to be sure, assert that such a limitation was built into the exemption provision at the time of its first enactment, as 49 U.S.C. § 5(8), in the Transportation Act of 1920.[5] Their only support for this contention, however, is the fact that in Title III of the 1920 Act, ch. 91, 41 Stat. 456, 469, Congress created a Railroad Labor Board. Union Br. at 36. That fact plainly does not support the claimed limitation on the exemption provision, as we have previously explained (NW Br. at 31 n.33). There simply is no evidence that Congress intended the all-encompassing language of the exemption provision—"all other restraints or prohibitions by law, State or Federal . . . ."—to exclude Title III, a federal law. There certainly is no inconsistency between the establishment in Title III of an administrative structure intended to facilitate the voluntary resolution of day-to-day labor disputes and the simultaneous grant to the ICC of exclusive authority over mergers, backed by an exemption of sufficient breadth to relieve railroads, when necessary to the carrying out of such transactions, of any expectation that they would submit to the Title III dispute resolution scheme.[6]

Shipping Act's express antitrust exemption for certain rate-making activity with argument that overall structure of the act impliedly repeals application of antitrust laws to the shipping industry as a whole). It is the Union Respondents who would have this Court fail to give effect to § 11341(a).

[5] Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482, codified as 49 U.S.C. § 5(8).

[6] Title III provided for the voluntary creation of adjustment boards to arbitrate disputes concerning "grievances, rules, or working conditions," Transportation Act of 1920, § 303, 41 Stat. 469-70; *see id.* § 302, 41 Stat. 469, subject to appeal to the Railroad Labor Board, *id.* § 307(a), 41 Stat. 470; and for direct

The Union Respondents necessarily must find the labor relations exclusion to have been established in the 1920 Act, because they rely on it in their effort to avoid the obvious implication of Congress' handling of the issue in the next pertinent enactment,[7] the Emergency Railroad Transportation Act of 1933 ("ERTA"), ch. 91, 48 Stat. 211. The Union Respondents contend (Union Br. at 36-38) that the reason the exemption provision in the temporary ERTA Title I contained a savings clause for the RLA and labor agreements, while the one in the permanent ERTA Title II did not, is that the Federal Railroad Coordinator's powers exceeded those of the ICC and Congress wanted to ensure that the Coordinator's orders did not infringe upon RLA rights.[8] In so arguing, the Union Respondents necessarily *concede* that the plain language of the ERTA Title II exemption, a forerunner of § 11341(a), sweeps the RLA (and labor agreements) within its scope, for it would have been pointless for Congress to include a savings clause in

submission of such disputes to the Labor Board where no adjustment board was created, *id.* Disputes over wages were to be presented directly to the Labor Board. *Id.* § 307(b), 41 Stat. 471. Decisions of the adjustment boards and the Labor Board were not legally enforceable. *Pennsylvania R.R. System & Allied Lines Federation No. 90 v. Pennsylvania R.R.*, 267 U.S. 203, 215-16 (1925); *Pennsylvania R.R. v. United States Railroad Labor Board*, 261 U.S. 72, 84-85 (1923).

[7] The Union Respondents do not endorse the Court of Appeals' view that the enactment of the RLA in 1926 manifested a congressional intent to exclude labor agreements from the reach of the exemption provision. See NW Br. at 33 n.34.

[8] Thus, the Union Respondents assert, without reference to authority, that Congress "specifically limited" the ERTA Title I exemption provision "*because* [the Coordinator's] orders were mandatory . . . ." Union Br. at 36 (emphasis added).

ERTA Title I if the exemptive language, which was substantially the same in both ERTA titles, did not otherwise reach the RLA and labor agreements. The Union Respondents would hope to avoid this obvious conclusion by contending that the same words in the two ERTA titles really mean different things—that, in Title I, the words "restraints . . . by law, State or Federal" include the RLA, while in Title II they do not. But all the Union Respondents have to offer in defense of this innovative approach to plain language is the *deus ex machina* that the ICC lacks jurisdiction over labor relations. Union Br. at 38.[9]

The significance of ERTA is that the statute demonstrates clearly that Congress knows how to carve out special protection for the RLA and labor agreements when it chooses. Congress did so for a three-year period where it thought this appropriate, but did not do so in its general grant of authority to the ICC over consolidations, from which § 11341(a) is descended.

As for the failed Harrington amendment to the 1940 Act, the Union Respondents have virtually nothing to say (Union Br. at 39). This Court has explained that the Harrington amendment—whose language is essentially what the Union Respondents contend has somehow been in the law from the start—"introduced a new problem" as it "threatened to prevent all consolidations to which it related." *Railway Labor Executives' Association v. United States*, 339 U.S. 142,

[9] It was held long ago that the exemptive language in ERTA Titles I and II has a single meaning. *Texas v. United States*, 6 F. Supp. 63, 65 (W.D. Mo.) (three-judge court) (per curiam), *aff'd*, 292 U.S. 522 (1934).

151 (1950). Congress rejected the Harrington amendment for this reason, *id.* at 147-54, and neither the amendment's language nor its functional equivalent has been made part of the Interstate Commerce Act.

In this connection, we have already shown (NW Br. at 43-48) that the 1976 amendment of the predecessor to 49 U.S.C. § 11347[10] did not enact, *sub silentio*, the Harrington amendment by removing the RLA and labor agreements from the scope of the § 11341(a) exemption. We anticipated and answered all of the Union Respondents' arguments (Union Br. at 45-47) relating to the 1976 statutory amendment.

The Union Respondents also suggest, in passing, that § 11341(a) perhaps does not apply here at all because the transfer of work at issue in this case did not "carry out" the Norfolk Southern railroad control transaction that the ICC approved. Union Br. at 25-26. The control transaction, they would say, was fully "carried out" when Norfolk Southern Corporation exchanged its stock certificates for the stock certificates evidencing separate ownership of NW and Southern. The Union Respondents of course cite no authority in support of this proposition, which ignores the obvious meaning of the statutory words, and the proposition is insupportable. *Texas v. United States*, 292 U.S. 522, 533-35 (1934).[11] The courts have routinely

[10] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 402(a), 90 Stat. 31, 62.

[11] In *Texas v. United States*, the Court, holding the statutory exemption then in effect (ERTA Title II) applicable to the ICC's approval of a lease providing for the removal of offices from Texas in disregard of state law restrictions, said:

> The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure, the removal of such burdens when imposed by state requirements was an essential part of the plan.

292 U.S. at 534-35.

found that the § 11341(a) exemption applies to operational changes that constitute the implementation of ICC-approved rail transactions. *E.g.*, *Missouri Pacific R.R. v. United Transportation Union*, 782 F.2d 107, 111-12 (8th Cir. 1986) (per curiam) (operation of trains using trackage rights authorized by the ICC in connection with a rail merger held exempt from RLA challenge), *cert. denied*, 482 U.S. 927 (1987); *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424, 427, 431 (8th Cir.) (post-merger coordination of rail yards held exempt from RLA), *cert. denied*, 375 U.S. 819 (1963). *See generally ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. at 287 (Stevens, J., concurring).[12]

Lacking any support for their reading of § 11341(a) in the actions of Congress, the Union Respondents turn instead to the actions of the ICC and of the railroads themselves. But no support for the Union Respondents' position is to be found in either place.[13]

[12] There is no significance to the fact (Union Br. at 3) that when NW and Southern filed their primary ICC control application, they also filed, as statutorily required, four companion applications for approval of the construction of connecting tracks and two for approval of line abandonments. *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, 366 I.C.C. 173, 245-47 (1982).

[13] The Union Respondents also cite to *Texas & New Orleans*

The ICC decisions cited by the Union Respondents (Union Br. at 28-32) belie the contention that, before 1983, the ICC took the position that transactions it had approved as in the public interest remained vulnerable to defeat through the assertion of RLA-derived rights. In *Chicago, St. Paul, Minneapolis & Omaha Ry. Lease*, 295 I.C.C. 696 (1958), the ICC merely held that there was no need for it specifically to declare whether a carrier should be relieved from the RLA because the exemption provision was self-executing. *Id.* at 702.[14] The whole point of *Southern Ry.—Control—Central of Georgia Ry.*, 331 I.C.C. 151 (1967), was to make clear that employees could *not* invoke RLA rights in connection with the carrying out of an approved transaction, *id.* at 162-64, as the assertion of such rights "would seriously impede mergers," *id.* at 171. And in *Norfolk & Western Ry.*

R.R. v. Brotherhood of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1982), *cert. denied*, 371 U.S. 952 (1963), in support of their position that the ICC's "exclusive jurisdiction" under § 11341(a) is really of "limited nature." Union Br. at 41. But *Texas & New Orleans* stands for no such proposition. In that case, the Fifth Circuit held only that, in the circumstances presented, 49 U.S.C. § 5(11) (the predecessor to § 11341(a)) did not operate to overcome the withdrawal of federal court jurisdiction to enjoin a strike accomplished in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. The Fifth Circuit, however, went on to make clear that if the ICC's jurisdiction over transactions was "being frustrated by application of Norris-LaGuardia to the present suit, we would have to conclude that Norris-LaGuardia was preempted by section 5(11), even though section 5 is not labor legislation." 307 F.2d at 158.

[14] The ICC also observed, on the facts of the case, that the RLA had not been shown to have been a barrier to the carrying out of the particular lease transaction involved. 295 I.C.C. at 702.

and New York, Chicago & St. Louis R.R.—Merger, Etc., 347 I.C.C. 506, 511-12 (1974), the ICC expressly stated that the exemption provision applies to RLA-derived rights. That position has long been and remains a cornerstone of ICC regulation of mergers and consolidations.[15]

Nor is there anything in the railroads' own behavior over the years that would suggest that the railroads thought themselves subject to labor agreement claims that could defeat the carrying out of approved mergers. The Union Respondents contend (Union Br. at 17, 27) that the railroads must have had such an understanding because otherwise the railroads would not have entered into supposedly costly agreements in connection with several significant mergers, mostly in the 1960s, which provided employees with guarantees of lifetime employment (so-called attrition protection agreements). No such inference is permissible.

In case after case, the record makes clear that the railroads of that era considered the cost of attrition protection to be slight—in some instances even less than the cost of compliance with the employee protective conditions that would otherwise have been imposed by the ICC under the predecessor to § 11347. *E.g., Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, 544 (1966) (carriers calculated that cost of attrition protection would be $5 million less than cost of ICC's protective conditions); *Norfolk*

[15] *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311, 335 (1952), evidences not a disavowal (Union Br. at 21 n.37) but a recognition of the ICC's authority to abrogate private contracts in the case of transactions, unlike the one involved in *Gulf, Mobile* itself, to which the exemption provision applied. See NW Br. at 20 n.23.

& Western Ry. and New York, Chicago & St. Louis R.R.—Merger, Etc., 324 I.C.C. 1, 89 (1964) (anticipated gain in number of jobs available on the merged system would counterbalance the costs of protecting existing employees against loss of jobs); *Norfolk & Western Ry. Merger, Etc., Virginian Ry.*, 307 I.C.C. 401, 439 (1959) (same).

Moreover, the railroads considered the costs associated with providing attrition protection to be far outweighed by the gains the railroads obtained in the bargains they struck with the unions. Typically, the railroads obtained the contractual right to transfer employees and work throughout the merged systems, *without regard* to whether the transfers were necessary to the carrying out of the approved mergers—an advantage beyond what the railroads could obtain by virtue of the statutory exemption.[16] And in exchange for attrition protection, the railroads also obtained the unions' agreement to drop their opposition to the mergers.[17]

[16] *E.g.*, *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. at 685; *Norfolk & Western Ry. and New York, Chicago & St. Louis R.R.—Merger, Etc.*, 324 I.C.C. at 89; *Great Northern Pacific & Burlington Lines, Inc.—Merger, Etc.—Great Northern Ry.*, 331 I.C.C. 228, 278 (1967), *aff'd sub nom. United States v. ICC*, 296 F. Supp. 853 (D.D.C. 1968) (three-judge court), *aff'd*, 396 U.S. 491 (1970).

[17] For example, as a result of the Orange Book agreement involved in Case No. 89-1028, labor ended its challenge to the ICC's approval of the consolidation of the Atlantic Coast Line Railroad and the Seaboard Air Line Railroad. *See Florida East Coast Ry. v. United States*, 259 F. Supp. 993, 1017-19 (M.D. Fla. 1966) (three-judge court) (RLEA "bitterly attacks as inadequate" the employee protective conditions imposed by ICC), *aff'd in part and appeal of RLEA dismissed as moot per curiam*, 386 U.S. 544, 545 (1967).

The Union Respondents even claim to find comfort in the bipartisan support for the lifetime protective benefits that Congress wrote into Title V of the 3R Act, which created Conrail.[18] According to the Union Respondents (Union Br. at 27-28), the railroad industry's support for those generous employee benefits somehow shows that the railroads did not believe that the ICC's approval of an ordinary rail merger under the Interstate Commerce Act carried with it any exemption from the restrictions of existing labor agreements. But the Union Respondents ignore that the conveyance of bankrupt railroad properties to Conrail was not an ordinary merger under the Interstate Commerce Act; that Title V labor protection was largely to be funded by the government, not the railroads; that employees of the former Penn Central—the principal predecessor to Conrail—already enjoyed lifetime wage protection and the 3R Act therefore did not expand but merely continued in effect an existing level of benefits; and that, as part of the package, Conrail was given the right to transfer work and employees throughout its system without regard to whether the transfer was causally related to the transaction authorized by the 3R Act.[19]

[18] Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985.

[19] Title V was repealed in 1981 by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 669, largely because it proved too expensive, Northeast Rail Service Act of 1981, 95 Stat. 644, 45 U.S.C. § 1101(4). Moreover, the ICC itself has made clear that Title V represented "a development arising outside the mainstream of employee labor protection under section 5(2)(f) of the [Interstate Commerce] act." *Oregon Short Line R.R.—Abandonment Portion Goshen Branch*, 354 I.C.C. 76, 84 (1977).

Point by point, there simply is no substance to any of the contentions advanced by the Union Respondents. This is hardly surprising. More than fifty years ago, this Court recognized that employees inevitably would lose fundamental contract rights as a consequence of ICC-approved railroad mergers. *United States v. Lowden*, 308 U.S. 225, 233 (1939). It was precisely because of the need to redress such loss that the ICC was authorized to impose compensatory employee protective conditions even absent a specific statutory directive. *Id.* at 233-34 ("just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national transportation policy of railroad consolidation" furthers the successful prosecution of that policy). Finally, the question whether § 11341(a) reaches labor agreements governed by the RLA was addressed, and answered in the affirmative, by the four Justices concurring in the judgment in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. at 295, 298, an opinion the Union Respondents have elected not to mention.

III. The Straightforward Question Of Statutory Interpretation Presented By This Case Is Not Influenced By Any Fifth Amendment Issue.

Although the Union Respondents do not squarely assert that the ICC order in this case accomplished a "taking" of property or deprived them of due process within the meaning of the Fifth Amendment, they contend that the Court should read § 11341(a) their way in order to avoid creating a possible constitutional difficulty. Union Br. at 47-49. The invitation should be declined not only because the Union Respondents' statutory interpretation is plainly incorrect, but also because the supposed constitutional problem is nonexistent.

The purported "taking" claim fails the analysis of *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). There, the Court stated that whether a given governmental action constitutes a Fifth Amendment taking should be determined on the basis of an ad hoc factual analysis of three factors of "particular significance": the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. *Id.* at 225; *accord Bowen v. Gilliard*, 483 U.S. 587 (1987).

The enforceability of contracts that relate to the railroad industry has always been contingent on the federal government's legislative and regulatory initiatives. *E.g., Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 482 (1911) (statute forbidding free passes for travel by rail that deprived plaintiffs of their lifetime passes did not effect a taking because regulation of the industry was foreseeable). The NW employees represented by ATDA in this case could not reasonably have expected their contracts to be immune from federal regulation. *See United Transportation Union v. Consolidated Rail Corp.*, 535 F. Supp. 697, 705-08 (Special Ct., Regional Rail Reorg. Act) (Friendly, J.) (no taking where statute extinguished contract rights of railroad employees and subjected some employees to termination), *cert. denied*, 457 U.S. 1133 (1982); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935) ("Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control

of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").[20]

The ICC's routine imposition of employee protective conditions in railroad consolidation cases, in accordance with the Interstate Commerce Act, reconciles the interests of railroads and their employees. All the NW employees whose interests are involved in this case have received the full benefit of the protective conditions, including wage protection for up to six years. In addition, these employees benefitted from having the opportunity to be hired by Southern as officers, on better terms and at higher pay than they had previously enjoyed.[21]

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[20] "Perhaps no industry has a longer history of pervasive federal regulation than the railroad industry." *Consolidated Rail Corp. v. Metro-North Commuter R.R.*, 638 F. Supp. 350, 357 (Special Ct., Regional Rail Reorg. Act 1986) (citing *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 469 (1985), and holding that statute relieving congressionally created rail corporation of its contractual obligations to provide commuter services did not effect a taking despite financial loss caused to the other contracting parties).

[21] The Union Respondents acknowledge that employees receive compensation through the mechanism of the ICC's protective conditions but they find the compensation insufficient, saying that the conditions "protect an employee's compensation but, because they are premised on the assumption that contract rights will be preserved, do not compensate employees for lost *contract* rights." Union Br. at 49 (emphasis in original). The extent to which the protective conditions contemplate the preservation of existing contracts is a subject of dispute, but the resolution of that dispute does not bear on the question presented on certiorari. Our view is that the protective conditions safeguard existing contract arrangements to the extent that the ICC, in

Here, the ICC did not appropriate any assets for public use, but merely presided over a legitimate adjustment of the "benefits and burdens of economic life to promote the common good," *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. at 225. There is, accordingly, no taking for which compensation would be required.[22]

There is, similarly, no reason to entertain the Union Respondents' supposed due process complaint. A federal statute alleged to impair a private contract is subject to "especially limited," "minimal" judicial scrutiny. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 472 (1985). "The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and ' "establish that the legislature has acted in an arbitrary and irrational way." ' " *Id.* (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).[23] No such showing could conceivably be made here. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15 (Court has long "upheld against due process attack the competence of Congress to allocate the interlocking eco-

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implementing its 49 U.S.C. § 11347 authority, has decided such action is appropriate. No claim of constitutional magnitude is precipitated by the ICC's decision.

[22] The Union Respondents could not press a taking claim in any event until they had sought compensation through the presumptively available Tucker Act remedy. *See, e.g., Preseault v. ICC*, 110 S. Ct. 914, 921-22 (1990).

[23] Even this minimal scrutiny is not reached unless the impairment of private contract is proved "substantial." *National R.R. Passenger Corp.*, 470 U.S. at 472.

nomic rights and duties of employers and employees . . . regardless of contravening arrangements between employer and employee"); *Atkins v. Parker*, 472 U.S. 115, 129-30 (1985) (Where federal legislation adjusts economic benefits and burdens, " 'the legislative determination provides all the process that is due.' ") (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)); *United Transportation Union v. Consolidated Rail Corp.*, 535 F. Supp. at 705-08.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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